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CHONG SU KONG & ORS

v.

SIA HIONG TEE & ORS;
MESSRS JOHARI & ZELIKA (THIRD PARTY)

B

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
CHEW SOO HO J
[CIVIL SUIT NO: K21-5-2006]
19 MARCH 2013

C

CIVIL PROCEDURE: *Appeal - Appeal from Registrar to judge in chambers - Taxation of costs - Whether appeal filed within time - Whether time to be construed from date of pronouncement of order - Whether date of clarification of order altered date on which order was pronounced - Whether draft order bearing wrong date led plaintiffs to believe they were within time to appeal -*

D

Whether extension of time to file appeal allowed - Rules of Court 2012, O. 1A, O. 3 r. 5, O. 56 r. 1(1) & (3) - Courts of Judicature Act 1964, s. 3

The plaintiffs filed an appeal on 13 December 2012 against the order of the Senior Assistant Registrar ('SAR') made on 1 October 2012 on the

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taxation of costs in respect of this action to the judge in chambers pursuant to O. 56 r. 1 of the Rules of Court 2012 ('ROC'). The first to the forth defendants raised a preliminary objection that this appeal was not filed within 14 days as prescribed by O. 56 r. 1(3) of the ROC and as such, was not maintainable and ought to be dismissed *in limine*. However, the plaintiffs argued that although the order of the SAR on

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taxation was made on 1 October 2012, a clarification of the order was sought and heard on 6 December 2012. The defendants argued that under O. 56 r. 1(3) of the ROC, the appeal should have been filed within 14 days after the SAR's decision as pronounced on 1 October 2012. The argument was based on s. 3 of the Courts of Judicature Act

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1964 ('CJA') which defined the word 'decision' as one which finally disposed of the rights of the parties concerning the costs in the action. On the contrary, the plaintiffs contended that their appeal was filed within time because the sealed copy of the SAR's order was dated 6 December 2012 and not 1 October 2012. It was further contended

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that the draft order of the SAR was sent to the first to the fourth defendants for approval and was duly approved without amending the date of the order which was stated as 6 December 2012 to 1 October 2012 and consequently, the sealed order of court was dated 6 December 2012 upon which the plaintiffs filed their notice of appeal.

I

Held (dismissing preliminary objection):

(1) The order on the taxation of costs made by the SAR on 1 October 2012 would have disposed of the right of the parties. Such order was thus an order or decision within the meaning of O. 56 r. 1(1) or r. 1(3) of the ROC and s. 3 of the CJA. A clarification of a judgment, order or decision was not itself a judgment, order or decision but it merely sought to clarify ambiguity, technical or inadvertent errors but it does not change the judgment, order or decision which had been pronounced. (para 7)

(2) By reading O. 42 r. 7(2) of the ROC, the order of the SAR was pronounced on 1 October 2012 and rightfully, it must be dated with this date as there was no indication that the court had ordered it to be dated with any other date. Thus, the plaintiffs were out of time when they filed their notice of appeal on 13 December 2012 from the date of clarification on 6 December 2012 instead of the date of the pronouncement of the order on 1 October 2012. (para 9)

(3) The plaintiffs relied on the belief that the first to the forth defendants had agreed and accepted the date of the order to be 6 December 2012. The plaintiffs would be deprived of their rights to appeal for want of time because of such an error since the first to the forth defendants had endorsed and approved the said draft order without raising any amendment or objection. Pursuant to O. 1A of the ROC, the court gave regard to the overriding interest of justice and not only to the technical non-compliance with the rules. (para 11)

(4) Although O. 56 r. 1(3) of the ROC was a mandatory provision when it used the word 'shall be filed within fourteen days ...', a discretion was provided to the court in O. 56 r. 1(3) of the ROC where it was stated 'Unless the court otherwise orders ...'. By reading O. 1A of the ROC and O. 56 r. 1(3) of the ROC together, it was just that the plaintiffs should not be deprived by such inadvertent error but should be allowed to make an application under O. 3 r. 5 of the ROC to extend the time to appeal in the interest of justice. (para 12)

(5) Costs was allowed to the first to the fourth defendants in the sum of RM1,500 on the ground that their contention was technically correct pursuant to O. 56 r. 1(1) and r. 1(2) of the ROC 2012. (para 12)

Case(s) referred to:

Bozson v. Altrincham Urban District Council [1903] 1 KB 547 ***(refd)***

Syarikat Ingan Lumbar Sdn Bhd v. Tahang Timber Sdn Bhd [2003] 2 MLJ 495 ***(refd)***

Teoh Poh Keong Sdn Bhd v. Shinhan Engineering & Construction Co Ltd [2001] 2 CLJ 440 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 3
Rules of Court 2012, O. 1A, O. 3 r. 5, O. 42 rr. 5, 7(2), O. 56 r. 1(1), (2), (3)

For the plaintiff - M/s Roland Cheng & Co
For the 1st to 4th defendants - M/s Grace Chaw & Co
For the 5th defendant - State Attorney-General's Chambers, Sabah
For the 3rd party - M/s Nohin & Partners

Reported by Sandra Gabriel

JUDGMENT

Chew Soo Ho J:

Introduction

[1] Plaintiffs have filed an appeal on 13 December 2012 against the order of the learned Senior Assistant Registrar ("SAR") made on 1 October 2012 on the taxation of costs in respect of this action to the Judge in Chambers pursuant to O. 56 r. 1 of the Rules of Court 2012.

[2] At the onset of this appeal, learned counsel for the first to the fourth defendant had raised a preliminary objection that this appeal was filed out of time and thus not maintainable and ought to be dismissed *in limine*.

[3] Upon this preliminary objection, both parties have advanced their respective arguments *vide* written submissions for the determination by this court on this issue.

Findings Of Court

[4] The order of the learned SAR on taxation was undoubtedly made on 1 October 2012 but a clarification of the order was sought and it was heard on 6 December 2012 whereupon the plaintiffs then filed the appeal on 13 December 2012 against the decision of the learned SAR. If the appeal is against the decision of the learned SAR made on 1 October 2012 the appeal would be out of time when it was filed on 13 December 2012 and if the date of clarification is construed to be the date of the decision of the learned SAR which is 6 December 2012, then the notice of appeal lodged on 13 December 2012 would be well within the 14 days after the said clarification order as contended by learned counsel for the plaintiffs.

[5] Order 56 r. 1(1) of the Rules of Court 2012 provides that "An appeal shall lie to a Judge in Chambers from any judgment, order or decision of the Registrar of the High Court".

[6] Order 56 r. 1(3) Rules of Court 2012 states: A

> (3) Unless the Court otherwise orders, the notice shall be filed within fourteen days after the judgment order or decision appealed against was given or made, and shall be served not less than five days before the date fixed for the hearing of the appeal.

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[7] Learned counsel for the defendant contended that by referring to s. 3 of Courts of Judicature Act 1964, the word "decision" means "judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties" citing *Syarikat Ingan Lumbar Sdn Bhd v. Tahang Timber Sdn Bhd* [2003] 2 MLJ 495; *Teoh Poh Keong Sdn Bhd v. Shinhan Engineering & Construction Co Ltd* [2001] 2 CLJ 440; [2001] 2 MLJ 50. In short for the purpose of appeal if O. 56 r. 1(1) and/or r. 1(3) Rules of Court 2012 is to be read together with the definition of "decision" as provided under s. 3 of the Courts of Judicature Act 1964, it would mean that the "judgment, order or decision" given or made by the Registrar of the High Court must have finally disposed of the rights of the parties but does not include any ruling in the course of a trial or hearing which does not finally dispose of the rights of the parties. In *Bozson v. Altrincham Urban District Council* [1903] 1 KB 547, the English Court of Appeal held that if the judgment or order, as made, finally dispose of the rights of the parties, then it ought to the treated as a final order. From the facts in the instant case, the order on the taxation of costs was made by the learned SAR on 1 October 2012 and that order would have disposed of the right of the parties when it was made on the issue of the costs in the action. Such order is thus an order or decision within the meaning of O. 56 r. 1(1) or r. 1(3) Rules of Court 2012 and/or s. 3 of the Courts of Judicature Act 1964. Any clarification sought subsequent to the date of such judgment or order or decision does not extend the date when such judgment order or decision was made. In any event, clarification of a judgment, order or decision, in my view, is not itself a judgment, order or decision but it seeks to clarify what may seem ambiguous or some technical or inadvertent errors but it does not change the judgment, order or decision which had been pronounced. This is particularly so when after the clarification, there is no variance of the judgment, order or decision that had been made. I do not think that the date of the clarification of the judgment, order or decision of the SAR can be construed as the date of the judgment, order or decision for if it is so, it can undoubtedly be subject to abuse for simple reason that an appellant who would be out of time to file his appeal could then make a request for clarification in order to extend or enlarge the time to avoid a more onerous application for extension of time.

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[8] Learned counsel for the plaintiffs contended that pursuant to O. 42 r. 5 Rules of Court 2012, the sealed order of the SAR dated 6 December 2012 was initially sealed on 13 December 2012 and thus when the plaintiffs' notice of appeal was filed on 13 December 2012, it was in compliance with the 14 days time frame under O. 56 r. 1(3) Rules of Court 2012. I find that this argument can be dispelled by reading O. 42 r. 7(2) which says that:

> 7(2) Such a judgment or order shall be dated as of the day on which it is pronounced, given or made unless the Court orders it to be dated as of some other earlier or later day, in which case it shall be dated as of that other day.

[9] The order of the learned SAR was pronounced on 1 October 2012 and rightfully, it must be dated with this date as there is no indication that the court had ordered it to be dated with any other date. It would therefore be wrong in law to date the order with a later date when there is no order from the court to date other than the date of the pronouncement of the order.

[10] For the foregoing reasons, I hold that the plaintiffs are out of time when they filed their notice of appeal on 13 December 2012 from the date of clarification on 6 December 2012 instead of the date of the pronouncement of the order on 1 October 2012.

[11] However, in the particular circumstances of this case where the draft order of the learned SAR was sent to the learned counsel for the first to fourth defendant for approval, it was duly approved without amending the relevant date of the order which was stated as 6 December 2012 to 1 October 2012 and consequently the sealed order of court is dated 6 December 2012 upon which the plaintiffs have filed their notice of appeal. By not insisting that the plaintiffs must first file the order of court as pronounced on 1 October 2012 before the subsequent order on 6 December 2012 after the clarification, the plaintiffs relying on the belief that the first to fourth defendant had agreed and accepted the date of the order to be 6 December 2012, would be deprived of their rights to appeal for want of time because of such an error which the first to fourth defendant had apparently endorsed when they approved the said draft order without raising any amendment or objection. O. 1A Rules of Court 2012 states that:

> In administering these Rules, the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non compliance with these Rules.

[12] O. 56 r. 1(3) is no doubt a mandatory provision when it uses the word "shall be filed within fourteen days …". Nevertheless, a discretion is vividly provided to the court when at the commencement

of this O. 56 r. 1(3), it states "Unless the court otherwise orders ...". On the fact and circumstances as alluded above and reading O. 1A and O. 56 r. 1(3) Rules of Court 2012 together, I find it just that the plaintiffs should not deprived by such inadvertent error but should be allowed to make an application under O. 3 r. 5 Rules of Court 2012 to extend or abridge the time to appeal in the interest of justice and I so order that such application is to be filed within ten days from the date hereunder. With that, I dismiss this preliminary objection. However, I allow costs to the first to fourth defendant in the sum of RM1,500 on ground that first to fourth defendant's contention is technically correct pursuant to O. 56 r. 1(1) and r. 1(2) of the Rules of Court 2012.